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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSEPH VITO FAZIO AND LEE JAMES JENSEN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

NANCY HOLLANDER
Counsel of Record
K.C. MAXWELL
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG
& CLINE, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960
Counsel for Petitioners

51pp

QUESTION PRESENTED

Whether a finding of reasonable suspicion can be based, in whole or in part, on an officer's questions and observations made during a period of unlawful detention?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph Vito Fazio and Lee James Jensen petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A) is unreported. The trial court's order denying Mr. Fazio's and Mr. Jensen's motions to suppress evidence (App. B) is unreported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit filed its decision on September 14, 1998. On October 29, 1998, the court of appeals denied Mr. Fazio's and Mr. Jensen's motions for rehearing (App. C). This petition is timely under Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Fazio and Jensen file a joint petition pursuant to Sup. Ct. R. 12.4.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On Friday, October 25, 1996, at 2:57 a.m. Orange County Sheriff's Deputies Lane Mooney and Joe Stinnett were traveling eastbound on Interstate 10 in Orange County, Texas, on drug interdiction patrol when they stopped Joseph Fazio's vehicle, a 1996 Dodge Caravan. T. Vol. VI, 10; 40; 45; 116; T. Vol. VIII, 656; Ex. B. Joseph Fazio ("Fazio") was driving and Lee Jensen ("Jensen") was sleeping in the back seat. T. Vol. VI, 5; 19-20; 45. The officers were assigned to the narcotics unit of the Orange County Sheriff's Department and both were wearing drug interdiction fatigues when they stopped Fazio. T. Vol VI, 39-40; 153; Ex. B. Mooney claimed he paced their vehicle for one-fourth mile and determined that it was traveling 69 miles per hour in a 65 mile per hour zone and that was the reason he gave for stopping the vehicle. He left his ticket book in his vehicle, however, and never wrote Fazio a ticket for speeding. T. Vol. VI, 41; 46.[1/]

After Mooney activated his emergency lights, Fazio immediately drove off the highway and stopped in an eastbound rest area. T. Vol. VI, 46; Ex. B. Mooney approached the

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[1/] Between May 1996 and April 1997, Mooney stopped approximately 1,700 drivers on Interstate 10 allegedly for various traffic violations. Ex. H. Throughout that entire time period, he did not write a single traffic citation, even though he paced one driver at 90 miles per hour, encountered numerous drivers without drivers' licenses, and stopped approximately 900 drivers for weaving, which, according to Mooney, is one of the main indicators of driving while intoxicated. T. Vol. VII, 304; 428; 430; 431; Ex. H. From those 1,700 detentions, he made five arrests for drugs. T. Vol. VII, 458; Ex. J.

driver's side of the van and required Fazio to step outside the vehicle. He demanded and received Fazio's driver's license and vehicle registration. T. Vol. VI, 77. Both were in Fazio's name. Fazio was not belligerent nor argumentative and he was cooperative. T. Vol. VI, 181.

Mooney testified that after looking at Fazio's license and registration papers, he had completed his speeding investigation. T. Vol. I, 151. This speeding investigation concluded by 3:01 a.m. Ex. A; B. After completing the speeding investigation, however, Mooney continued to detain Fazio and Jensen and asked numerous questions unrelated to speeding in an effort to establish reasonable suspicion to support a continued detention. T. Vol. VII, 141-51.[2/]

Mooney asked Fazio where he was coming from, to which Fazio responded, "Houston." Mooney also asked him who they had stayed with and how long they had been in Houston. Fazio told the officer the first and last name of his friend in Houston and said they had been there "about a week." T. Vol. IX, 798; Ex. A; B.

After questioning Fazio, Mooney awakened the passenger, Jensen, demanded his driver's license and immediately began interrogating him. In response to questions similar to those posed to Fazio, Jensen, who had just awakened, also said they

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[2/] Q:[Defense Counsel]: "Now, when you asked him these questions with respect to who did he visit with, what's his friend's name, what's his friend's last name, and whether or not he stayed with him and where does he live, sir, again, none of those questions are relevant to this alleged incident of speeding that you allegedly are in the process of investigating, Correct?"

A:[Mooney]:"Yes, sir. I've already investigated the traffic stop with Mr. Fazio." T. Vol. VI, 151.

were coming from Houston where they had visited a friend and that they had stayed "a couple of days." T. Vol. IX, 799.

Although Mooney assured both defendants he would check the status of their licenses, issue a verbal warning for the alleged speeding and let them go on their way, he made no efforts to do so and did not intend to do so. T. Vol. VI, 124. He did not contact his dispatcher to run their licenses on the computer.[3/] Instead, Mooney continued to detain them, now telling Fazio, "while we're waiting, you mind if I search your car?" T. Vol. VI, 172. Fazio declined to give the officer permission to search. Ex. A; B.

At that point Mooney told Fazio and Jensen they could not leave because he planned to have his dog, Rambo, walk around the vehicle, although Mooney admitted he would not have let them leave from the moment he stopped them. T. Vol. VI, 25. He told Fazio that if "he alerts on your van, I'm going in it anyway." Fazio again told Mooney he did not consent to any search. At 3:07 a.m. Stinnett, who had been standing near the front of the police vehicle, took Fazio and Jensen to the side of the road where he continued to detain them during the remainder of the encounter. T. Vol. VI, 25; Ex. B.

After the drug dog allegedly alerted on the vehicle, the officers began their search of the vehicle at approximately 3:10 a.m., which was nine minutes after the traffic stop concluded. Ex. A, B. Ultimately, Mooney found the alleged marijuana and pills. After that, at 3:35 a.m., 38 minutes after Mooney stopped Fazio, and 34 minutes after Mooney, by his own admission, had completed his traffic investigation, Mooney finally called his

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[3/] Mooney could contact his dispatcher at any time without returning to the police vehicle because he had a radio mounted on his shoulder. T. Vol. VI, 177.

dispatcher and asked the dispatcher to run Fazio's and Jensen's drivers' licenses on the computer. T. Vol. VI, 131. At the suppression hearing, Mooney produced, for the first time, a copy of a written warning allegedly issued to Fazio for speeding. T. Vol. VIII, 538-39, Ex. M.

Fazio and Jensen filed pretrial motions to suppress evidence and statements. On May 14, 1997, the trial court denied Fazio's motion to suppress evidence and granted his motion to suppress statements; the court denied Jensen's motion to suppress evidence and statements. (App. B). The trial court held that the officer's questions were not reasonably related to the traffic stop, but that the questions "did not extend the detention to an impermissible length." (App. B).

On May 30, 1997, Fazio and Jensen entered conditional pleas of guilty, preserving their rights to appeal the denial of their motions to suppress evidence.

REASON FOR GRANTING THE WRIT

The Court should grant the writ because the decision of the court of appeals conflicts with this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion). Those cases hold, with respect to the constitutional limits on police action and the reasonableness of a seizure, (1) that an officer's action must be justified at its inception, (2) that the officer's action must be reasonably related in scope to the circumstances which justified the interference in the first place, and (3) that an investigative detention must not last longer than necessary to effectuate the purpose of the stop.

This case also presents an important issue of Fourth Amendment interpretation that this Court should resolve. Under the court of appeals decision, an officer can unlawfully

detain an individual after completing a traffic stop in an effort to develop articulable facts supporting reasonable suspicion. This holding encroaches on the privacy guaranteed by the Fourth Amendment as articulated in *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

THE COURT OF APPEALS' OPINION AFFIRMING THE TRIAL COURT'S FINDING OF REASONABLE SUSPICION, BASED ON AN OFFICER'S OBSERVATIONS AND QUESTIONS AFTER THE ORIGINAL INVESTIGATION CONCLUDED AND DURING A PERIOD OF ILLEGAL DETENTION, CONFLICTS WITH THIS COURT'S DECISIONS IN *TERRY V. OHIO* AND *FLORIDA V. ROYER* AND PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. It is beyond question that the stopping of a vehicle and the detention of its occupants is a "seizure" within the meaning of the Fourth Amendment. *See Prouse*, 440 U.S. at 653.

The court of appeals held that this "case presents a close question regarding the validity of an automobile search on an interstate highway. It boils down to a judgment call of whether the arresting officer unreasonably extended an otherwise legal detention." (App. A).

The trial court held that the officer was justified in initiating the traffic stop of Fazio's van for speeding, satisfying the first prong of *Terry*. The second inquiry pursuant to *Terry* is whether the officer's action was reasonably related in scope

to the circumstances that justified the interference in the first place. *Terry*, 392 U.S. at 20. The trial court recognized the constitutional problems with Mooney's continued detention of Fazio and Jensen, which was not related in scope to the speeding violation that originally justified the interference. However, the court erroneously ruled that the continued detention was reasonable because of its brevity. *But see Royer*, 490 U.S. at 498 (finding a person "may not be detained even momentarily without reasonable, objective grounds for doing so").

The trial court held that Mooney concluded his traffic citation investigation and then asked questions that were not reasonably related to the purpose of the original stop. (App. B). While the court cited *Royer*, 460 U.S. at 500, it held that the unrelated questioning did not extend the detention an impermissible length. Instead, the court found that the officer could expand the investigative detention beyond its initial purpose because he ultimately developed reasonable suspicion, even though that reasonable suspicion did not develop until minutes after the initial investigation had concluded.

Where, as here, a trial court holds that the questions supporting reasonable suspicion were wholly unrelated to the original stop, and where the officer admits that the speeding investigation was finished when he asked the unrelated questions that he claimed created reasonable suspicion, further analysis of the duration of the detention is not necessary. *Royer*, 460 U.S. at 500 (an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop). Once the initial investigation is complete and the officer does not have reasonable suspicion, the inquiry is over – the officer cannot continue to detain defendants in an effort to develop reasonable suspicion. *See United States v. Sharpe*, 470 U.S. 675 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it

appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain defendant."). Here, the officer admitted he had completed his investigation of the speeding violation *before* he developed facts supporting reasonable suspicion:

> Q:[Defense Counsel]: "Because you had finished that speeding investigation long ago, and you are now engaged in the accumulation of articulable facts that would lead you to reasonable suspicion to believe that this vehicle can be continued to be detained for purposes of a drug interdiction search. Correct?"
>
> A:[Mooney]: "That's correct."

T. Vol VI, 157. *See also United States v. Knowles*, 119 S. Ct. 484, 488 (1998) ("Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."). The trial court also found that:

> the deputies' questions about where and with whom Fazio stayed in Houston were not reasonably related to the traffic stop. These questions do not concern the speeding issue or any issue of driver safety . . .. The continued questioning of Jensen . . . was not reasonably related to the purpose of the initial stop. Jensen could not be held liable for the speeding violation, and any statements he made would be outside the scope of the investigation of that offense.

(App. B). As such, this Court is not put in the position of "indulg[ing] in unrealistic second guessing" of police conduct this Court feared in *Sharpe*. Mooney testified at the suppression hearing that he had concluded his investigation of the speeding violation almost immediately – before he continued to question Fazio about unrelated matters and before he awakened Jensen. Accordingly, any reasonable suspicion developed during the period of unlawful detention, admittedly beyond the conclusion of the traffic stop, is illegal fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

In light of the conflict between the court of appeals' decision and this Court's decisions in *Terry* and *Royer*, and because of the importance of the issue, the Court should grant certiorari on the question presented.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE, P.A.

By _____
NANCY HOLLANDER
Counsel of Record
K.C. MAXWELL
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41134

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JOSEPH VITO FAZIO,

Defendant-Appellant

****

No. 97-41135

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

LEE JAMES JENSEN

Defendant-Appellant

Appeals from the United States District Court
For the Eastern District of Texas
(1:96-CR-117-2)

(Filed Sep. 14, 1998)

Before REYNOLDO G. GARZA, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

This case presents a close question regarding the validity of an automobile search on an interstate highway. It boils down to a judgment call of whether the arresting officer unreasonably extended an otherwise legal detention.

We have considered the briefs, heard oral argument, reviewed the transcripts of the videotaped arrest, and the hearings on the motion to suppress. Ultimately, we are persuaded that the district court did not err in denying the motion to suppress. For essentially the reasons stated by the district court, we AFFIRM.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CRIMINAL NO.
	§	1:96-CR-117(1); 117(2)
JOSEPH VITO FAZIO	§	
AND LEE JAMES	§	
JENSEN	§	

MEMORANDUM OPINION DENYING
MOTION to SUPPRESS

(Filed May 14, 1997)

Introduction

Defendants Joseph Vito Fazio and Lee James Jensen were charged by indictment with possession of methylenedioxyamphetamine (MDA), methylenedioxymethamphetamine (MDMA), and marijuana, all of which are Schedule I controlled substances. Defendants were also charged with conspiracy to possess these substances with the intent to distribute them. Both defendants filed motions to suppress the drug evidence seized during a traffic stop in Orange County, Texas. The defendants also moved to suppress any oral statements they made in the course of this traffic stop, after one of the defendants invoked his right to counsel. The court convened a hearing on defendants motions on April 10, 1997. All parties were present and represented by counsel.

Factual Background

At approximately 2:57 a.m., on October 25, 1996, deputy Lane Mooney (Mooney) and deputy Joe Stinnet (Stinnet) of the Orange County Sheriffs Department initiated a traffic stop on a 1996 Dodge Caravan. The deputies observed the van traveling eastbound on Interstate 10 in excess of the posted speed limit. The van's speed was determined by "pacing" it with the patrol car for approximately one quarter mile. Mooney determined the van's speed to be 69 m.p.h. in a 65 m.p.h. zone. He then activated his emergency lights. The van exited the highway and stopped in the eastbound rest area. Sometime during the initial stop, a computer check was requested on the van's license plate to determine if it was stolen.

Mooney made contact with the driver of the Caravan, who produced a valid Florida driver's license identifying him as Joseph Vito Fazio (Fazio). Mooney also requested the van's registration which Fazio produced. Mooney escorted Fazio to the front of the patrol car where he began questioning Fazio about the purpose of his trip. The patrol unit was equipped with a video camera which recorded the entire stop.

After briefly questioning Fazio, Mooney approached the passenger side of the van and woke Lee James Jensen (Jensen), the only other person in the van, who had been sleeping in the back seat. He asked Jensen to step out of the van where he requested and received Jensen's driver's license. Mooney proceeded to ask Jensen the same questions he had asked Fazio.

Mooney then returned to Fazio and asked for permission to search the van. He told Fazio that his story and

Jensen's were not the same and that they both seemed unusually nervous. Fazio did not consent to a search. Mooney then told Fazio that he was going to detain them while he brought out his drug canine to inspect the van.

Mooney instructed both Fazio and Jensen to stand to the side of his patrol car while he retrieved his dog from the rear seat of the patrol car. Mooney brought the drug canine, "Rambo", to the front, driver's side of the van and began a search pattern on the exterior of the van. Rambo struck the front driver's door with his paw on the initial pass around the van. Mooney led Rambo around the van and returned to the driver's side, where the dog began to bark and become visibly excited. Rambo then jumped through the open driver's window onto the front seat of the van.

Mooney told Fazio that the canine had alerted on the van and that he was going to search it. The deputies proceeded to search the van and its contents, which included several suitcases and four white cardboard boxes. They discovered that the boxes contained marijuana weighing approximately 180 lbs. Inside one of the suitcases, they also found 5,000 pills which were later determined to be MDA and MDMA, both schedule I controlled substances. Fazio and Jensen were read their statutory *Miranda* warnings and placed under arrest.

Defendant Jensen's Standing to Contest Search

The United States concedes that Jensen has standing to contest the initial stop of the vehicle and the subsequent detention, as this conduct constitutes a seizure of his person. *See United States v. Brignoni-Ponce*, 422 U.S.

873, 878 (1975) (the Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of arrest). However, the United States has contested Jensen's standing to object to the search of the vehicle because he was merely a passenger in the van and had no ownership interest in it. The government argues that Jensen had no reasonable expectation of privacy in the interior of the van. In support of its position, the government cites *Rakas v. Illinois*, 439 U.S. 128 (1978).

In *Rakas*, the Supreme Court set forth the parameters for determining whether a defendant can challenge a search or seizure under the Fourth Amendment. The core inquiry is whether the defendant has a legitimate expectation of privacy in the invaded place. *Id.*, at 143. A search outside the defendant's zone of privacy cannot be challenged because Fourth Amendment rights are personal rights, which may not be vicariously asserted. *Id.*, at 133-34. The defendant bears the burden of proving he had a legitimate expectation of privacy in the area searched. *Id.*, at 130 n.1. The defendant must prove that he had a subjective expectation of privacy with respect to the place searched or item seized and that this expectation of privacy is one which society would recognize as objectively reasonable. *United State[s] v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996), *citing United States v. Kye Soo Lee*, 898 F.2d at 1037-38 (5th Cir. 1990).

At the suppression hearing, Jensen testified for the limited purpose of establishing his privacy interest in the vehicle and its contents. Jensen stated that he and Fazio drove Fazio's van from Orlando, Florida, to Houston, Texas, a trip which took approximately 16 hours. Jensen

drove the van for a portion of that trip. After arriving in Houston, Fazio entrusted the van to Jensen on at least one occasion and permitted Jensen to use the van at his discretion. On October 25, 1996, the date of the stop, Jensen and Fazio left Houston sometime around midnight, on their way back to Florida. Fazio drove and Jensen slept in the middle passenger seat of the van. Jensen testified that he was sleeping because he intended to drive when Fazio became tired.

Jensen also testified concerning the four white, cardboard boxes found inside the van. Jensen claimed ownership of all four boxes which contained marijuana. Jensen stated that the boxes were sealed shut to prevent the contents from being visible. Jensen also testified that he shared the suitcase, which contained the 5,000 pills of MDA and MDMA, with Fazio. Jensen's claim is supported by the fact that some of his personal effects, including a bottle of prescription medication, were found inside the suitcase. The suitcase was also zipped or fastened shut in an effort to maintain privacy within those items.

Based upon Jensen's testimony of ownership, which was undisputed, the court concludes that Jensen had an expectation of privacy in the boxes which contained marijuana. Likewise, the court concludes that Jensen had an expectation of privacy in the luggage which was commonly used by he and Fazio. Additionally, the court finds that this expectation of privacy is one which society would consider objectively reasonable. Therefore, the court concludes that Jensen has standing to contest the legality of the search of these containers.

However, the court finds that Jensen lacks standing to contest the search of the van itself, as he lacked any property or possessory interest in the van at the time of the stop. Although the van had been entrusted to Jensen on at least one occasion, it was no longer under Jensen's exclusive control. Fazio had resumed control and was driving at the time of the stop. The court doubts that Jensen could have continued to use the van at his discretion in the presence of Fazio, without Fazio's consent. For instance, Jensen could not have permitted others to enter the van, nor could he have excluded others, without Fazio's approval. The court concludes that Jensen had no expectation of privacy within the van itself.

This distinction is merely theoretical and without practical effect under the facts of this case, because no contraband or other evidence was found in the van, other than in the containers in which Jensen has a privacy interest. Furthermore, the court concludes that Jensen has standing to challenge the canine alert on the van as this alert is what gave the deputies probable cause to search the containers. *See United States v. Ross*, 456 U.S. 798 (1982) (holding that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search).

Burden

When the government conducts a warrantless search, it has the burden of proving, by a preponderance of the evidence, that the evidence was not obtained in violation of the subject's Fourth Amendment rights. *United States v.*

Chavis, 48 F.3d 872 (5th Cir. 1995), *citing United States v. Roch*, 5 F.3d 894, 897 (5th Cir. 1993).

Initial Stop

The defendants contend that Mooney did not have probable cause to believe that Fazio was exceeding the speed limit. Without probable cause, the initial stop was illegal and any evidence discovered as a result of the stop should be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

The stopping of a vehicle and the detention of its occupants is a "seizure" within the meaning of the Fourth Amendment. *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993). The search and seizure of motorists is analyzed under the framework established in *Terry* and applied to pedestrians in that instance. *Shabazz*, at 434, *citing United States v. Sharpe*, 470 U.S. 675, 682 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975). The Fourth Amendment is not a guarantee against all searches and seizures, but only against unreasonable searches and seizures. *Sharpe*, at 682. The Supreme Court has established a two part inquiry for evaluating the reasonableness of an investigative stop. *Terry v. Ohio*, 392 U.S. 1 (1968). The court must determine whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.*, at 20.

A temporary investigative stop is proper if the stop is based on reasonable suspicion that criminal activity may be afoot. *Terry*, at 29. Reasonable suspicion must be based

on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *United States v. Gomez*, 776 F.2d 542, 546 & n.2 (5th Cir. 1985). As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769, 1772 (1996).

Mooney testified that he "paced" Fazio's van for a quarter of a mile with his patrol car. He explained that pacing was necessary because the radar unit in his patrol car would not give an accurate reading if both vehicles were traveling in the same direction. He paced the van at 69 m.p.h. in a 65 m.p.h. zone.

Mooney learned the technique of pacing cars from a discussion he had with an instructor at the police academy and through practical, on-the-job, training from veteran officers. The technique involves nothing more than maintaining a constant distance between the patrol car and the subject vehicle and reading the speedometer of the patrol car to determine the other car's speed. The reliability of this method depends primarily on the accuracy of the patrol car's speedometer. Mooney admitted that he did not calibrate the speedometer of the patrol car on the day of the stop, but had no reason to doubt its accuracy. He testified that he verified his speedometer against the radar unit in his car on several occasions. He did this about once a week and always found the speed estimations to be the same.

The court concludes that Mooney had probable cause to believe that a violation of the traffic laws had taken

place. He followed the subject vehicle for a sufficient distance to determine its speed. He applied a simple, but acceptable, method to determine the van's speed. The speed was determined to be 69 m.p.h. In a 65 m.p.h. zone, a violation of Texas traffic laws. TEX. TRANSP. CODE ANN. Sec. 545.351. (Vernons 1996). Therefore, Mooney was justified in initiating a traffic stop of Fazio's van.

Length of Detention

The defendants also challenge the length of the investigative detention. They contend that they were detained beyond the time necessary to complete a routine traffic stop; that Mooney exceeded the bounds of the traffic stop when he began questioning them about unrelated matters; and that Mooney had no reasonable suspicion to justify prolonging their detention. Therefore, they conclude that any evidence discovered as a result of this improper detention should be suppressed.

The second prong of the *Terry* inquiry is whether the officer's action was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry,* 392 U.S. at 20. An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer,* 460 U.S. 491, 500 (1983). However, the Supreme Court has refused to draw a bright line regarding the permissible length of a *Terry* stop. *United States v. Sharpe,* 470 U.S. 675, 685 (1985); *United States v. Place,* 462 U.S. 696, 709 & n.10 (1983). Time periods as short as two minutes and as long as ninety minutes have been held unreasonable, while detention periods as long as twenty minutes and one

hour have been upheld. *See United States v. Gordon*, 917 F.Supp. 485 (W.D. Tex. 1996); *United States v. Place, supra; United States v. Sharpe, supra;* and *United States v. Hardy*, 855 F.2d 753 (11th Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989). The test is reasonableness. *See Ohio v. Robinette*, ___ U.S. ___, 117 S.Ct. 417, 421 (1996), *citing Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (the touchstone of the Fourth Amendment is reasonableness).

In assessing the reasonableness of the duration of an investigative stop, the court should examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. *Sharpe*, at 686. The Supreme Court emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. *Id.* The Supreme Court has also recognized the need of law enforcement officers to graduate their response to any given situation. *Place*, at 709 n.10.

Under appropriate circumstances, excessive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment. *United States v. Kelley*, 981 F.2d 1464, 1469 (5th Cir. 1993). However, questioning by an officer, even on a subject unrelated to the purpose of the stop, is not a *per se* violation of the Fourth Amendment. Rather it is the duration of the detention which is the focus of the *Terry* analysis. *Shabazz*, at 436.

There is no question that in a valid traffic stop, an officer can request a driver's license, insurance papers, vehicle registration, run a computer check, and issue a citation without exceeding the bounds of *Terry*. *United*

States v. Chavis, 902 F.Supp. 111, 114 (E.D. Tex. 1995), *citing Shabazz*, 993 F.2d at 437. While the officer is processing an efficient, timely registration check, the length of the detention is presumptively within the bounds of the Fourth Amendment. *Id.*, at 114.

Mooney testified that he initiated a license plate check, referred to as a code 1028, on Fazio's van prior to stopping the vehicle. He did not recall when the dispatcher relayed the information back to him, but he did recall receiving it at some point. He stated that the time it takes to receive a 1028 report varies. Mooney's recollection was confirmed by the police dispatch logs and by the testimony of Nancy Hall, one of the police dispatchers on duty that night. Ms. Hall testified that Unit 857, which was Mooney and Stinnet, requested a license check at 3:00 a.m. Ms. Hall also stated that the logs show the information was returned at some point, but the time is not indicated in the log. Ms. Hall could not give an approximation of the time necessary to run a license plate check because it depends on how busy the system is at the time. She did testify that an out of state plate would generally take longer than a Texas plate.

If the questioning of Fazio and Jensen took place while the deputies were awaiting a license plate check, the questioning itself would not serve to extend the duration of the initial, valid seizure. *Shabazz*, at 437. The defendants' contention that the questioning unreasonably extended the stop would necessarily fail. Further, they could not complain that the deputies failed to diligently pursue their investigation, because the license plate check was initiated prior to the vehicle stop. However, the evidence before the court does not clearly establish when

the license plate check was completed. Arguably, the processing of an out of state license plate is less than instantaneous and would serve to justify a portion of the detention. The court cannot determine how much of the interrogation took place while awaiting this license check. Therefore, the court will address the permissibility of the questioning independent of the license plate check.

The court must determine whether the questioning, when viewed objectively, was reasonably related in scope to the initial traffic stop. Even if the court concludes that the deputy exceeded the scope of permissible questioning, the issue is not foreclosed. Rather, the court must then determine if the impermissible questioning served to unreasonably extend the stop, resulting in a violation of the defendants' Fourth Amendment rights.

Mooney stopped the van, made contact with the driver, and obtained his license and registration. He handed these items to Stinnet to run a computer check on them. The computer check on Fazio's license did not begin until 3:35 a.m., after the defendants were already in custody. The processing of Fazio's license cannot be used to justify the continued detention of the defendants. *See United States v. Chavis*, 902 F.Supp. 111, 114 (E.D. Tex. 1995) (computer check on defendant's license was initiated after defendant was already in custody and could not support continuing investigative detention).

After giving Fazio's papers to Stinnet, Mooney proceeded to question Fazio about his travel plans. He asked about Fazio's passenger and whether the two drove from Florida together. Fazio answered affirmatively. Mooney told Fazio that he stopped him for, "running a little over

the speed limit." He asked how far Fazio planned to drive that night. Fazio replied that he was going to drive through Louisiana to Mississippi. He then asked if Jensen had also been driving. Fazio explained that Jensen was sleeping while he drove and planned to take over driving later. Mooney asked how long Fazio had stayed in Houston and with whom he had stayed. Fazio responded that he stayed with a friend, but hesitated in giving his friend's name. Mooney inquired further about where Fazio's friend lived. Fazio said that his friend lived in a townhouse off of Highway 59, but he could not remember the exact name or location. Mooney then left Fazio and went to the passenger side of the van to speak with Jensen.

Typically, a reasonable investigation of a traffic stop may include asking for the driver's license and registration, requesting the driver to sit in the patrol car, and asking the driver about his destination and purpose. *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994). If reasonably related questions raise inconsistent answers, or if the licenses and registration do not check out, a trooper's suspicion may be raised so as to enable him to expand the scope of the stop and ask additional, more intrusive, questions. *Id.*

The initial questioning of Fazio was reasonably related to the traffic stop. Mooney merely questioned Fazio about his destination and purpose. In light of the fact that the traffic stop occurred at 3:00 a.m. on Interstate Highway, Mooney could also question Fazio about matters of driver fatigue. Therefore, he could also ask about the length of Fazio's trip and whether the passenger, Jensen, had assisted Fazio in driving.

In contrast, the deputy's questions about where and with whom Fazio stayed in Houston were not reasonably related to the traffic stop. These questions do not concern the speeding violation or any issue of driver safety. However, it took less than one minute to ask these questions. Therefore, these questions did not make the duration of the traffic stop unreasonable.

After briefly questioning Fazio, Mooney walked over to the passenger side of the van and asked Jensen to step out of the vehicle. He obtained Jensen's license. He then asked Jensen the same questions regarding his travel plans. He also asked Jensen if he had been switching off driving with Fazio and if his driving record had any tickets on it.

Mooney could permissibly order the passenger, Jensen, out of the van. *Maryland v. Wilson*, ___ U.S. ___, 117 S.Ct. 882, (1997) (the public interest in officer safety outweighs the minimal intrusion caused by ordering the passenger to exit the vehicle). Under the circumstances, he was also permitted to ask for Jensen's driver's license, because Fazio had stated that Jensen and he were sharing the driving responsibilities. The continued questioning of Jensen, however, was not reasonably related to the purpose of the initial stop. Jensen could not be held liable for the speeding violation and any statements he made would be outside the scope of the investigation of that offense. In any case, the questioning of Jensen took only about one minute. Therefore, the questioning did not extend the detention to an impermissible length.

The defense has placed considerable emphasis on Mooney's subjective intent during the questioning of the

defendants. Mooney admitted during cross examination that many of his questions were not related to the traffic investigation, but were intended to confirm or dispel his suspicion that the defendants were carrying contraband. The defendants' position is analogous to that of pretext stops.

The Supreme Court foreclosed the issue of pretext stops in *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769 (1996), holding the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. Subjective intentions play no role in ordinary probable cause Fourth Amendment analysis. *Id.*, at 1774.

The Supreme Court recently extended the *Whren* analysis to an officer's motivation for continuing a traffic stop. *Ohio v. Robinette*, ___ U.S. ___, 117 S.Ct. 417 (1996). The *Robinette* Court held that the officer's subjective intentions do not make continued detention illegal, so long as the detention is justified by the circumstances, viewed objectively. *Id.*, at 418. As previously discussed, Mooney's questioning was objectively reasonable. Whether he pursued this line of inquiry for other, subjective reasons is immaterial.

At the point Mooney asked for consent to search the van he was clearly beyond the bounds of an ordinary traffic stop. Mooney could not lawfully detain the defendants without reasonable suspicion. *See United States v. Simmons*, 918 F.2d 476 (5th Cir. 1990). The scope or duration of an investigative detention may be expanded

beyond its initial purpose only if the detaining officer at the time of the detention has a particularized and objective basis for suspecting the particular person stopped of criminal activity. *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997).

The question of reasonable suspicion must be answered by looking objectively at the totality of the circumstances. *Simmons*, at 481. Reasonable suspicion must be supported by specific and articulable facts which, taken together with rational inferences from those facts, would warrant a person of reasonable caution in the belief that the intrusion was appropriate. *Id.* Common sense and ordinary human experience are to be employed, and deference is to be accorded a law enforcement officer's ability to distinguish between innocent and suspicious actions. *Wood*, at 946.

Mooney testified that he became suspicious almost immediately upon making contact with Fazio. Fazio appeared to be unusually nervous. His hands were shaky, he was breathing rapidly, and he was rocking back and forth on his feet. Mooney also became concerned for his personal safety due to Fazio's large physical size and the fact that it was 3:00 a.m. He testified that Fazio looked at him as if he was, "sizing him up." Mooney's initial suspicions were raised by inconsistencies in the statements of Fazio and Jensen and by Jensen's demeanor. When Mooney asked how far Fazio intended to drive he stated, "through Louisiana to Mississippi." When Jensen was asked the same question he stated, "home," which Mooney interpreted to mean Florida. Fazio also said he had been in Houston for about a week. Jensen said that they had been in Houston only for a couple of days.

When Mooney asked Fazio the details about where and with whom he had stayed in Houston, Fazio hesitated and appeared to be searching for a name. Fazio was also unsure of the location where his friend resided. Mooney placed significance on this fact because, in his opinion, Fazio should remember the location if he had stayed there for a week.

Mooney's suspicion was intensified by Fazio's reaction when Mooney said he intended to wake the passenger and ask him some questions. Fazio made a remark that Jensen was "in a coma," which Mooney interpreted as an attempt to discourage any questioning of Jensen. Mooney testified that when he first approached the van he saw Jensen raise his head and open his eyes, so he knew Jensen was not asleep. Mooney also described Jensen's demeanor as nervous. He testified that Jensen avoided eye contact and answered his questions in an abrupt manner. In addition, Mooney stated that it was unusual for a passenger to be nervous during a routine traffic stop, because he or she will not receive a citation.

Factors such as nervousness and inconsistent statements have been cited numerous times to support an officer's reasonable suspicion. *See United States v. Simmons*, 918 F.2d 476 (5th Cir. 1990); *United States v. Hanson*, 801 F.2d 757 (5th Cir. 1986); *United States v. Kelley*, 981 F.2d 1464 (5th Cir. 1993). However, the court is hesitant to place too much emphasis on such rote incantations as nervousness. The Tenth Circuit has repeatedly held, and aptly so, that nervousness is of limited significance in

determining reasonable suspicion and that the government's repetitive reliance on nervousness as a basis for reasonable suspicion must be treated with caution. *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997). *See also United States v. Fernandez*, 18 F.3d 874 (10th Cir. 1994). In this case, however, several independent factors exist to support the deputy's suspicion.

Fazio and Jensen gave conflicting statements about their trip. Fazio could not remember where he had stayed in Houston. Jensen appeared to be feigning sleep to avoid questioning by Mooney and Fazio attempted to dissuade Mooney from "waking" Jensen. The defendants were also traveling from Houston, a known source city for illegal drugs, at an unusual hour.

Based on the totality of the circumstances, the court concludes that Mooney's suspicion was reasonable. He was, therefore, justified in extending the original detention to allow a drug canine to inspect the vehicle.

Dog Alert

The defendants have contested not only the validity and reliability of the drug canine's alert, but also whether the drug dog actually alerted. This is a fact issue which the court must determine prior to reaching the issues relating to the dog's ability to detect the presence of narcotics.

Mooney testified that the dog alerted on the driver's door of the van. The dog indicated the presence of narcotics by scratching the driver's door on the first trip around the van and again by barking, becoming visibly

excited, and jumping through the open driver's window on the second trip around the van. The defense contradicted this testimony with two expert witnesses, Dr. Dan Craig and Lieutenant Bobby Mutter (Mutter), who stated their opinions that the dog did not alert.

Dr. Craig holds a bachelor degree in animal science from Texas A&M, a master's degree in experimental psychology from Baylor University, and a doctor of veterinary medicine degree from Texas A&M. He worked extensively with the military and numerous government agencies writing training protocol for drug detector dogs. He wrote the training manuals used at Lackland Air Force Base to train detector dogs. He actually designed the four-hole variable method used to train drug dogs, including the dog at issue in this case.

Dr. Craig stated his opinion that Rambo did not exhibit a final response or "alert" during the course of the search. Dr. Craig testified that he was not even sure what final response Rambo had been trained to make, because the training records were incomplete. However, it appeared to him that Rambo had been trained to respond by scratching or biting. Barking was never indicated in the training records as an affirmative response. Dr. Craig stated succinctly that he did not see the dog alert. He did see the dog put his front feet up on the van, but did not see the dog make the characteristic scratching response. He would expect to be able to see the dog scratch if he was alerting on the van. Dr. Craig also stated his opinion that Rambo's barking was not a valid alert, because this response was prompted by Mooney's repeated question, "What you got?" Dr. Craig also testified that Rambo was

prompted to jump into the van when Mooney said "hup, hup, hup."

Further, Dr. Craig stated that Rambo should have "gone to source" when he entered the van, if he detected the presence of marijuana. Going to source means that Rambo should have jumped over the seats and gone back to the boxes filled with marijuana. Finally, Dr. Craig testified that he did not see Mooney give Rambo his reinforcement, which is what he would expect if the dog alerted as Mooney claims.

Lieutenant Mutter also doubted that Rambo alerted on the van's driver door as claimed by Mooney. He stated that he would expect Mooney to reward Rambo immediately if he had alerted. Lieutenant Mutter also testified that Mooney talked the dog into an alert on the second trip around the van. Mooney cued the dog to give some sort of response by repeating the question, "What have you got?" Mutter also testified that Rambo didn't appear focused on the exterior of the van and in a search pattern during the stop of Fazio and Jensen. It was his opinion that Rambo's alerts are not reliable for determining the presence of marijuana, because it is impossible to determine the reliability of Rambo from the records kept by Mooney.

The government countered the defense experts' testimony with the expert testimony of Officer Scott Lisenby (Lisenby) of the Beaumont Police Department. Lisenby received his training about drug detecting canines through the military. He was originally trained as a dog handler and was later selected to become an instructor. Lisenby received four weeks of training as a handler and

attended 216 hours of technical training in order to become an instructor. He has been involved in training approximately 300 handlers and their dogs.

Lisenby testified that, in his opinion, Rambo alerted twice on Fazio's van. The first alert occurred at the driver's door, when Rambo struck the door with his paw. The second alert occurred when Rambo was brought around the vehicle and again alerted on the driver's door. According to Lisenby, Rambo alerted on the door a second time by scratching. He testified that he could hear on the videotape the sound of Rambo scratching the van's paint. Lisenby stated that this second alert occurred prior to Rambo barking and jumping through the van window.

Mooney testified that he did not permit Rambo to "go to source," because he was unsure of what was in the back of the van. The dog could be harmed if he ingested any drugs he might find. Lisenby also explained that when a dog reaches the point of highest odor concentration, or "saturation point," he cannot go any further. The dog will simply stop at that point and look around. Lisenby stated that 180 lbs. of marijuana could confuse the dog and prevent him from going to the source.

With respect to his failure to reward Rambo at the point of alert, Mooney explained that he simply forgot and left the dog's reward in the patrol car. In lieu of the reward, he gave the dog verbal praise and petting, to reinforce his behavior.

The court is presented with diametrically opposed opinions, rendered by qualified experts and based upon the same facts. Dr. Craig's credentials are impressive and his knowledge of dog training techniques is perhaps

unparalleled. His opinion in this case, however, is limited by the fact that he is unfamiliar with the particular canine involved – he never worked with Rambo.

At the hearing, the court inquired of Dr. Craig regarding this limitation on his ability to state unequivocally that Rambo did not alert. In response to the court's question, "Can you say that he did not alert?" Dr. Craig admitted that, "I did not see him – I cannot say he did not." The court continued, "Do you know if he did or not?" Dr. Craig answered, "I do not know whether he did or not, correct." The court concludes that Dr. Craig's testimony, that the dog did not alert, is substantially undermined by these admissions.

Further, the court has independently reviewed the videotape of the stop. On the tape, Rambo does appear to strike the driver's door of the van with his front paw. Based upon Mooney and Lisenby's testimony that Rambo was trained to scratch as a final response, the court is convinced that Rambo alerted when he struck the van door. The remainder of Rambo's actions, including barking and jumping through the van window, do no appear to constitute valid alerts. The testimony of Dr. Craig and Lieutenant Mutter casts serious doubt on whether these actions were an independent response of the canine, or whether they were triggered by Mooney's prompting. This does not alter the court's conclusion that a valid alert was made.

Dog's Training and Certification

The defendants focused their efforts at the suppression hearing on challenging the drug canine's training

and certification. In particular, the defendants claim that, although Rambo is a certified drug canine, his certification is inadequate and based upon improper standards; that Rambo's training is not sufficient; and that Rambo's reliability is questionable. The defense contends that Rambo's positive response, if any, was insufficient to give Mooney probable cause to believe that narcotics were present in the van.

The government takes a contrary position, contending that Rambo was trained according to commonly accepted techniques; that Rambo's proficiency was tested on at least two occasions when he was certified by independent drug canine associations; and finally, that his reliability need not be established pursuant to Fifth Circuit precedent.

A drug canine's alert is sufficient to support probable cause to search a vehicle. *United States v. Levine*, 80 F.3d 129 (5th Cir. 1996), *citing United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995); *United States v. Mendez*, 27 F.3d 126, 130 n.5 (5th Cir. 1994) (citing other circuits recognizing that a dog sniff alone supports probable cause).

The standard for judging a drug canine alert has not been clearly established in this Circuit. The Fifth Circuit first addressed the issue in *United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993). In *Daniel*, after postal workers became suspicious about an unusual package, it was presented to a drug canine. The dog alerted to the presence of narcotics. Based upon this alert and the unusual circumstances surrounding the package, police officers obtained a search warrant from a magistrate judge and opened the box. The narcotics which were found in the

box were eventually delivered to Daniel and he was convicted of possessing narcotics with the intent to distribute.

On appeal, Daniel challenged the warrant issued by the magistrate judge on several grounds, one of which was the failure of the probable cause affidavit to specify the qualifications of the dog that sniffed the box. The Court of Appeals rejected Daniel's argument and held that a statement in the affidavit explaining that the dog was trained to detect the presence of controlled substances was sufficient. In a footnote, the Court also specifically rejected the argument that a probable cause affidavit must show how reliable a drug detecting dog has been in the past. *Daniel,* at 152 n.7.

In *United States v. Williams,* 69 F.3d 27 (5th Cir. 1995), the Fifth Circuit extended the holding of *Daniel* to warrantless searches based upon drug canine alerts. The court reasoned that, "because a showing of the dog's reliability is unnecessary with regard to obtaining a search warrant, a fortiori, a showing of the dog's reliability is not required if probable cause is developed on site." *Id.* at 28. However, the *Williams* Court concluded with a contrasting citation to *United States v. Diaz,* 25 F.3d 392 (6th Cir. 1994), creating some confusion about this Circuit's position on the issue of drug canine reliability.

This court has addressed the issue of warrantless canine searches on at least one prior occasion. *See United States v. Hare,* 932 F.Supp. 852 (E.D. Tex. 1996). In *Hare,* this court also commented on the uncertain state of Fifth Circuit law with respect to dog alerts. After reviewing *Daniel, Williams,* and *Diaz,* the court concluded that some

showing of training must be made. The court found the testimony of the canine handler sufficient to prove the dog's training. The court did not address whether a showing of the dog's reliability was necessary, as the court concluded that other circumstances, including an informant's tip, established probable cause. This court concluded that the dog's alert was simply another factor that served to corroborate the informant's information. The court noted that in a situation where a dog sniff is the only means of obtaining probable cause, a court might require a stronger showing of the dog's training. *Hare* at 853.

Defendants urge this court to follow the standard set forth in *United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994), requiring an affirmative showing of the dog's training and reliability to establish probable cause. The *Diaz* court analogized the alert of a drug dog to the testimony of an expert witness. The court reasoned that a dog's training and certification were similar to an expert's education and experience. Relying on this analogy, the court held, when the evidence presented establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. This reasoning would permit a certified drug dog to "testify" that narcotics were present, by means of an alert. The court would then have to determine whether this "testimony" was credible, based upon the dog's past reliability. If the dog's reliability was established then the dog's alert would give the officer probable cause.

Other courts, struggling with the issue of canine alerts, have also used analogies to support their reasoning. *See United States v. Florez*, 871 F.Supp. 1411, (D.N.M. 1994) (rejecting expert witness analogy in favor of informant analogy). Based upon these analogies, certain variations in the requisite proofs have arisen among the Circuits. Courts relying on the informant analogy do not require a strict showing of reliability, but instead look to the totality of the circumstances, in keeping with the law of informants. *Illinois v. Gates*, 462 U.S. 213 (1983) (rejecting rigid two-prong test for informant testimony in favor of more flexible "totality of the circumstances test").

Although this Circuit has not expressly adopted either approach, *Daniel* addresses the issue in terms of an informant's testimony. *See Daniel*, at 152 n.7, (rejecting theory that an affidavit in support of a search warrant must show how reliable a drug detecting canine has been in the past). The use of the informant analogy would explain why the Fifth Circuit does not require an affirmative showing of the dog's reliability.

This court also finds the informant analogy preferable to the Sixth Circuit's approach. The court agrees with the reasoning in *Florez*, that the issue of "credibility" is not the proper focus in terms of a canine alert. Credibility goes merely to the weight of the dog's alert, not whether he is qualified to alert in the first place. Given the nature of canine "testimony," which can only be a positive or negative response, the credibility analysis is of little value. Further, the *Florez* court aptly recognized that the Sixth Circuit's approach improperly shifts the burden of proof to the defendant to challenge the dog's credibility, once the dog's qualifications has been shown. *See Chavis*,

48 F.3d 871 (5th Cir. 1995). For these reasons, this court chooses to follow the approach of the District Court in *Florez*.

Regardless of which approach a court uses, the bottom line is whether probable cause exists to warrant the intrusion by law enforcement officers. Whether probable cause is based upon facts observed first hand by police officers, information given by an informant, or the positive alert of a drug canine, the analysis should be the same. In *Gates*, the Supreme Court held that the existence of probable cause must be determined by the totality of the circumstances surrounding the intrusion. *Florez*, at 1418, *citing Gates*, 462 U.S. at 238.

The court must determine whether the totality of the circumstances surrounding Rambo's alert support a finding of probable cause. Lisenby testified that he was involved in training Rambo from the time Mooney first acquired the dog in October of 1995. In fact, Lisenby assisted Mooney in acquiring Rambo for the purpose of training him as a drug dog. Lisenby testified that he worked with Rambo on a daily basis for the first six month [sic] of his training. This training lasted from thirty minutes to three hours per day. Thereafter, he has continued to work with the dog about one day per month. Lisenby trained Rambo using the techniques he had learned in the military. These techniques were in fact designed by Dr. Craig, during his association with the military.

Lisenby also worked with Rambo to refine his search skills, so they could be applied to real world search situations. Lisenby also instructed Mooney about proper

dog handling techniques and possible real-world problems associated with drug searches in the field. Rambo was trained specifically to search vehicles and was taught to ignore certain odors, such as fabric softener, frequently used by drug smugglers to mask the scent of drugs.

In order to validate Rambo's training, Lisenby would occasionally set up search scenarios without Mooney's knowledge and then present them to Mooney and Rambo. Lisenby testified that Rambo responded appropriately to the test scenarios on every occasion.

Lisenby trained Rambo to begin searching for drugs when he was given the command, "suk", which is a German term commonly used in training search dogs. The particular term used to cue the dog is not significant. Through the course of training, the phrase, "Get your gift," was often used by the handler, and Rambo came to associate this term with the search task. This command was given during the stop of Fazio's van and prompted Rambo to begin a search.

Lisenby trained Rambo to respond to drug odor by scratching at the location of the odor. This type of response is known as an aggressive response, as opposed to a passive response, such as sitting. Rambo scratched the door of Fazio's van at least once and possibly twice, thus indicating the presence of narcotics.

Rambo is a certified drug detection canine. He holds certifications from both the National Narcotic Drug Detector Association and the Texas K-9 Police Association. Rambo is certified in the detection of both marijuana and cocaine. In order to receive these certifications, Rambo was required to pass a test administered by an

independent evaluator. The test required Rambo to search a location within a building and locate at least one of two hidden containers of narcotics. Rambo successfully completed both tests, the second only two weeks prior to the search of Fazio's van.

Lisenby described Rambo's proficiency and Mooney's dog handling skills as excellent. Lisenby stated his opinion, that Rambo is a properly trained and certified drug canine and that he is very reliable. Lisenby estimated Rambo's accuracy rate at 90% or greater.

The experts called by the defense have placed a great deal of emphasis on the failure of Mooney to keep detailed training records. Dr. Craig and Lieutenant Mutter both testified that the lack of detailed records created doubts about the dog's reliability. In response, Lisenby stated his opinion, that the records kept by Mooney were adequate for their purpose. He explained that the purpose of training records is to assist the handler and allow him to focus his training on problem areas. Formal records might be necessary for military dogs, due to the turnover rate among military dog handlers. But, since Mooney was the only person working with Rambo, the records only needed to be good enough for his understanding.

The defense experts also challenged the certification procedure used by the NNDDA and the Texas K-9 Association. They contend both certifications were improper because they were conducted inside a building. Dr. Craig testified that vehicle searches are quite different from building searches, because buildings are a controlled environment and road-side vehicle searches involve

numerous other elements which can be a distraction to the dog.

Lisenby testified that he had personally certified eight or nine dogs in buildings and had trained approximately 150 others, who were also certified in buildings. These dogs were not restricted to searching just buildings, but could apply their search capabilities to any location, including vehicles. The purpose of certification is simply to test whether the dog recognizes the odor of narcotics and will exhibit the trained response.

The defense experts also criticized the certification technique because it only required the dog to find one of two hidden drugs. The defense experts argued that this was only 50% proficiency and no better than chance. Lisenby agreed that the dog was only required to find one cache of drugs, but explained that the test was terminated at that point. The dog never searched for the second container of hidden drugs. In Lisenby's opinion, if the dog found the first container, the dog would be 100% accurate, not 50%. The defense argument is also flawed because it assumes a 50% accuracy rate is equal to mere chance. This would be true if the dog was simply presented a container and asked to respond either positively or negatively. A random guess would generated [sic] an expected accuracy of 50% in this situation. The searching of buildings to determine the exact location of drugs, however, is not the same as simply determining whether the building does or does not contain drugs. The court seriously doubts that a dog could randomly select the exact location in a building with 50% accuracy. Even assuming that the dog found only one of two containers of drugs, the dog must have the ability to recognize the

odor of drugs. This is all that the test is designed to determine.

Based on the totality of the circumstances, the court concludes that Rambo's alert is sufficiently reliable to support a finding of probable cause. Rambo received over six months of training, according to military training procedures. He also received training in real-world search scenarios. His ability to detect drugs was tested and certified by two independent canine associations, the latest only two weeks prior to the stop in question. Although Mooney did not keep detailed records of Rambo's training and utilization, his accuracy was estimated at 90% or better.

Verbal Statements

Defendants contend they were improperly subjected to custodial interrogation without having been advised of their *Miranda* rights. They argue that when Fazio asked for an attorney, all questioning should have ceased and any statements they made after that time should be suppressed.

The prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates that prior to any questioning, the person was warned of his right to remain silent, that any statement he makes can be used against him, and that he has a right to an attorney. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). If the individual indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. *Id.*, at 445.

Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way. *Id.*, at 444. Persons temporarily detained for purposes of a traffic stop are not "in custody" for the purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protection prescribed by *Miranda*. *Id., citing Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). To determine custody for *Miranda* purposes we ask whether a person in the suspect's position would have been reasonable in concluding that there was a restraint on personal movement to the degree associated with formal arrest. *United States v. Garcia*, 77 F.3d 857, 859-60 (5th Cir. 1996).

Defendants contend they were "in custody" for *Miranda* purposes from the point Mooney asked for permission to search the van. They base this contention on the fact that Mooney told Fazio to turn off the van and stand near the patrol car while he conducted a canine search. Defendants argue that a reasonable person would not feel free to leave the scene under the circumstances.

Although the defendants were not free to leave the scene, their personal movement was not restrained to the degree associated with formal arrest at the point where Mooney asks for consent to search. Their detention was merely based upon reasonable suspicion and was more akin to a *Terry* stop then a formal arrest. Not until

Mooney discovered the drugs were the defendants formally arrested. They were read the *Miranda* warning at that time.

The facts of this case are somewhat unusual because Fazio requested an attorney prior to any custodial questioning. The issue now is, when must the officers cease questioning Fazio?; from the time he requests and [sic] attorney?; from the time he is placed in custody?; or not until he again requests an attorney after being placed in custody? The *Miranda* case holds that if the individual indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. *Miranda,* at 445. The court interprets this to mean all questioning must cease from the time Fazio fist [sic] requested an attorney. However, the court need not address this issue because the government concedes that all statements made by Fazio after he requested an attorney are inadmissible.

The government does not make the same concession with respect to Jensen. Jensen did not ask for an attorney at any point during the stop. After he was placed in custody and read his *Miranda* rights, he only made two statements. He gave his name and answered affirmatively that he understood his rights. Prior to this, Jensen did make a statement regarding ownership of one of the suitcases. The court has already concluded that he was not in custody for purposes of *Miranda* warnings at the time he made this statement, so it is admissible.

Further, Jensen cannot vicariously assert Fazio's invocation of his right to counsel. Fifth and Sixth Amendment rights, like Fourth Amendment rights, are personal

in nature and cannot be asserted vicariously. *United States v. Fortuna*, 796 F.2d 724, 732 (1986). Any statements which Fazio made are admissible against Jensen.

Conclusion

The deputies had probable cause to initiate a traffic stop on Fazio's van. The duration of the stop was within the bounds of the Fourth Amendment. During the traffic stop, the deputies developed a reasonable suspicion that the van contained contraband. A certified drug canine inspected the van and alerted to the presence of narcotics. At that point, the deputies had probable cause to search the van. The deputies discovered illegal drugs inside several containers in the van. The defendants' motions to suppress the tangible evidence are denied.

During the stop, Fazio requested an attorney. At this point, all questioning of Fazio should have ceased. Any statement made by Fazio, in response to the deputies' questioning, after he invoked the right to counsel is suppressed. Fazio's motion to suppress oral statements is, therefore, granted. Jensen did not ask for an attorney, so any statements he made are admissible.

Jensen's motion to suppress oral statements is denied.

Signed this 14th day of May, 1997.

/s/ Thad Heartfield
THAD HEARTFIELD
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
V.	§	1:96-CR-117(1)
	§	
JOSEPH VITO FAZIO	§	

ORDER

(Filed May 14, 1997)

For the reasons discussed in the accompanying memorandum opinion, Defendant Fazio's Motion to Suppress Tangible Evidence and Statement [72] is **GRANTED** as to the verbal statements of defendant Fazio, it is **DENIED** in all other respects.

It is so **ORDERED**.

Signed this 14th day of May, 1997.

/s/ Thad Heartfield
THAD HEARTFIELD
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41134

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JOSEPH VITO FAZIO
Defendant - Appellant

****

No. 97-41135

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

LEE JAMES JENSEN,
Defendant - Appellant

Appeals from the United States District Court
for the Eastern District of Texas, Beaumont

ON PETITIONS FOR REHEARING

(Filed Oct. 29, 1998)

Before REYNOLDO G. GARZA, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Joseph Vito Fazio in the above is denied.

IT IS FURTHER ORDERED that the petition for rehearing filed by Lee James Jensen in the above is denied.

ENTERED FOR THE COURT:

/s/ Patrick S. Higginbotham
United States Circuit Judge

REHG-13